EXHIBIT 5

BEFORE THE NATIONAL LABOR RELATIONS BOARD Case No. 13-RC-21909

In the Matter of:

RUAN TRANSPORTATION CORP.

Employer,

And

Teamsters Local 705, IBT Petitioner,

And

Teamsters Local 710, IBT Intervener,

POST HEARING BRIEF OF INTERVENER, TEAMSTERS LOCAL 710, IBT

Petitioner filed a petition on February 1, 2010, seeking a unit of all full time and regular part time truck drivers and warehouse spotters/drivers employed by the Employer at the AM Castle Metal facility located at 3400 North Wolf Road in Franklin Park, Illinois. The payroll period eligibility date was February 28, 2010. An election was conducted on April 1, 2010. The results of that election necessitated a run-off election, as the final outcome reflected in the revised tally of ballots shows that the Petitioner and the Intervener both received 12 votes each, while zero votes were cast for the "no" option and there were no challenged ballots.

The run-off election was conducted by mail ballot, which commenced on May 14, 2010, with the ballot count taking place on June 2, 2010. At the count held on June 2, 2010, the tally of ballots reflects that the Petitioner and the Intervener both received 14 votes each. However there were two challenged ballots. The Employer challenged the ballot of Jose McDougall, Jr., as he had voluntarily resigned his employment effective May 4, 2010. The Employer challenged a second ballot that had markings in each of the boxes designating a choice for each of the labor organizations.

A hearing was held in the Chicago Regional office on June 21, 2010, to determine whether either of the two challenged ballots should be counted.

The ballot of Jose McDougall, Jr.

The established rule is that an employee who quits his employment and stops working on a date prior to the date of the election is not eligible to vote. *Dakota*

Fire Protection Inc., 337 NLRB 92 (2001). Moreover, the Board has sustained a challenge to a ballot of an employee who was discharged after the eligibility date, but before the election. Community Action Commission, 338 NLRB 664 (2003).

The challenged ballot of Jose McDougall, Jr. must be sustained and should not be counted. Mr. McDougall was employed by the Employer as a driver. (Transcript page (hereafter "T") 12) He last worked on Thursday, April 29, 2010. On Friday, April 30, Charles Robertson, the terminal manager, received a phone call from Local 710 agent Gary Abraham, inquiring about Mr. McDougall, Jr.'s employment status. (T 12, 16-17) Mr. Abraham said to Mr. Robertson that he had heard from some of the drivers that Mr. McDougall, Jr. had quit and asked what he knew about that. (T 16-17, 23-24) Mr. Robertson responded that he did not know anything about that. (T 17)

When Mr. McDougall failed to report to work on Friday and then on Monday, May 3, 2010, the dispatcher, Phil Caposey, telephoned Mr. McDougall on Monday, but was not able to reach him. (T 15, 20) Mr. Robertson himself called Mr. McDougall on Tuesday, May 4, 2010, but again could not reach him. (T 15-16, 21) Therefore, because Mr. McDougall did not report to work and did not call in for three consecutive work days, the Employer's policy considered him as a voluntary resignation. (T 12, 25-26; Employer Exhibit 1, 2) A few days later, Mr. McDougall's father, who is also a driver for the Employer at the same location, returned his son's company issued uniform and company cell phone to the Employer and informed the Employer that his son would not be returning to work. (T 13, 21) The effective date of Mr. McDougall, Jr.'s resignation/termination was May 4, 2010. (T 14; Employer Exhibit 1)

Since Mr. McDougall, Jr. failed to show up for work for three consecutive work days and failed to contact the Employer, he was treated in accordance with the Employer' policy as a voluntary resignation. Therefore, since Mr. McDougall, Jr. resigned prior to the election and he was not employed by the Employer on the date of the election, the challenge to his ballot must be sustained and his ballot should not be counted.

The mismarked ballot.

At the election, the Board Agent did not count a ballot that was marked in both union boxes. Upon a challenge by the Employer of the mismarked ballot, the Board Agent did not include the ballot in the tally of ballots. The pink ballot, which was admitted as Board Exhibit 2 at the hearing, shows an "X" in black ink in both the 705 and the 710 box. Moreover, it appears that the voter highlighted the "X" that he placed in the 710 box by shading the 710 box in with a purple marking. In contrast, the 705 box merely contains the "X" in black ink.

In order for a ballot to be valid, the Board requires that that the intent of the voter in marking his ballot must be clearly manifested. Daylight Grocery Company, Inc., 678 F.2d 905, (11th Cir. 1982). A voter's intent may be discerned even where a voter makes markings in two boxes. Wackenhut Corporation v. NLRB, 666 F.2d 464, 467-468 (11th Cir. 1982). Where an attempt to erase or obliterate one of the markings, the Board has found that the obvious inference is that the voter began to make a mark in one box and either changed his mind or realized that he was not marking the box of his choice. Id. at 468. In addition, where a ballot with multiple markings has additional markings that indicate a particular choice and the markings merely emphasize that choice. *Id*.

In this case, there is no attempt at erasure or obliteration of a marking on the ballot. It is clear that the voter initially marked the 705 box, but after having realized his mistake, decided to highlight the 710 box. Although both boxes contain an "X," the voter then sought to correct his mistake by highlighting his preferred choice on the ballot. He highlighted his choice by placing a purple highlight over the "X" in the 710 box. This highlight clearly indicates a particular choice and emphasizes his choice.

The conclusion here is consistent with the Board majority's reasoning in Bishop Mugavero Center for Geriatric Care, 322 NLRB 209 (1996), because the marking and the additional highlighting in the 710 box constitute the "other markings" on a double-marked ballot required by the majority in Bishop Mugavero Center to evidence a voter's clear intention in casting a ballot.

This interpretation is in line with that of the Board's in Osram Sylvania, Inc., 325 NLRB 758, 759 (1998). There, the Board held that the ballot expressed a clear expression of the voter's intent. The ballot was marked with a smudged diagonal line in the "Yes" box and an "X" in the "No" box, but also had additional marking in the "No" area of the ballot. The Board observed that even assuming that there was no smudge mark in the "Yes" box, the "X" in the "No" box, together with the additional markings in the "No" area of the ballot clearly express the voter's intent to vote "No" in the election.

Therefore, in applying existing Board precedent, in this case, since the intent of the voter is clear, the ballot must be declared a vote for Local 710. Local 710 Requests that the ballot be counted in its favor and that a certification of representative be issued.

However, if the Board decides to consider the mismarked ballot as a void ballot, Local 710 requests that another run-off election be held. In accordance with

Section 102.70 of the Board's Rules and Regulations, "In the event two or more choices receive the same number of ballots and another choice receives no ballots and there are no challenged ballots that would affect the results of the election, and if all eligible voters have cast valid ballots, there shall be no runoff election and a certification of results of election shall be issued." In this case, the initial election resulted in a tie between the two unions and no votes being cast in favor of having no union representation. In addition, not all eligible voters voted in the first election. Moreover, the run-off election ended in another tie between the two unions and is also marked by the void of any votes being cast in favor of no representation. In addition, not all eligible voters voted in the run-off election. There were 32 eligible voters on the voting list; only 30 voters voted, which resulted in 14 votes cast for each union and 2 challenged ballots. The intention of the voters is clear that they want union representation. Therefore, because not <u>all</u> eligible voters have cast a valid ballot, Local 710 requests a run-off election.

Dated at Chicago, Illinois, this 28th day of June 2010.

Respectfully Submitted

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